Supreme Court, U.S.
FILED

10-643 NOV 10 2010

No. OFFICE OF THE CLERK

In the
Supreme Court of the United States

INTERNATIONAL ASSOCIATION OF MACHINISTS
& AEROSPACE WORKERS, AFL-CIO,
LOCAL LODGE 1943,

Petitioner,

v.

AK STEEL CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

TIMOTHY M. BURKE
Counsel of Record
ROBERT H. MITCHELL
MANLEY BURKE, LPA
225 West Court Street
Cincinnati, Ohio 45202
(513) 721-5525
tburke@manleyburke.com

Counsel for Petitioner

November 10, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED FOR REVIEW

Where the grievance and arbitration provisions of a labor agreement clearly and unmistakably provide that an arbitrator shall determine issues of substantive arbitrability, but the provisions of a return to work agreement that is incorporated within the labor agreement expressly exclude many issues from arbitration, does a court or arbitrator determine the substantive arbitrability of grievances allegedly falling within the those exclusions?

PARTIES TO THE PROCEEDINGS

The caption of the case includes all parties to the proceedings in the district court and court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner International Association of Machinists & Aerospace Workers, AFL-CIO, Local Lodge 1943 is a 501(c)(3) organization. It issues no stock, and there is no parent corporation or publicly held company with any ownership interest.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CITED AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Factual Background. 2

B. Federal Proceedings. 6

REASONS FOR GRANTING THE WRIT 10

CONCLUSION 14

APPENDIX

Appendix A: Opinion/Judgment, United States Court of Appeals for the Sixth Circuit, (August 12, 2010) 1a

Appendix B: Order/Judgment, United States District Court, Southern District of Ohio, Western Division, (March 18, 2009) 21a

Appendix C: Excerpts from Agreement Between AK Steel Corporation and the International Association of Machinists And Aerospace Workers, AFL-CIO, Local Lodge 1943, Middletown, Ohio (March 15, 2007) 43a

TABLE OF CITED AUTHORITIES

CASES

AT&T Technologies v. Communications Workers,
475 U.S. 643, 123 S. Ct. 588, 154 L. Ed. 2d 491
(1986) 10, 11

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985
(1995) 11, 13

Granite Rock Co. v. Int'l Brotherhood of Teamsters,
561 U.S. , 130 S. Ct. 2847, 177 L. Ed. 2d 567
(2010) 11, 13

Rent-A-Center, West, Inc. v. Jackson,
561 U.S. , 130 S. Ct. 2772, 177 L. Ed. 2d 403
(2010) 11, 13

STATUTES

28 U.S.C. § 1254 1

Section 301 (a) of the Labor Management Relations
Act, 29 U.S.C. § 185 ..... 1, 6

PETITION FOR WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals, *Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO, Local Lodge 1943 v. AK Steel Corporation.*, is attached at App. 1a - 20a, and reported at 615 F.3d 706 (6th Cir. 2010). The unreported opinion of the district court, *Int'l Ass'n of Machinists & Aerospace Workers, Local Lodge 1943 v. AK Steel Corporation.*, No. C-1-08-294 (S.D. Ohio, March 18, 2009) is attached at App. 21a - 42a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on August 12, 2010. App. 19a - 20a. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Section 301 (a) of the Labor Management Relations Act, 29 U.S.C. § 185 (a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of

> the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. Factual Background.

Respondent AK Steel Corporation operates a steel mill in Middletown, Ohio known as the Middletown Works. App. 4a. Petitioner Local Lodge 1943 represents a bargaining unit of production and maintenance workers at the Middletown Works. App. 22a. The bargaining unit was previously represented by the Armco Employees Independent Federation, Inc. (AEIF). App. 23a. The AEIF and AK Steel were parties to a labor agreement which was effective from November 1, 1999 through February 28, 2006. App. 23a.

Article VII of the 1999 labor agreement set forth the parties' final and binding grievance and arbitration procedures. App. 23a. In regard to the determination of issues of both procedural and substantive arbitrability, Article VII, Section B(1) provided:

> If any question arises as to whether said dispute is or is not a proper grievance within the meaning of these provisions, the question may be reserved throughout the grievance procedure and determined, if necessary, by the. arbitrator.

App. 23a. Article VII, Section F (1) further provided:

> Either party to this Agreement shall have the right to refer to an impartial arbitrator any grievance (including the determination of the question under Section B, Paragraph 1, as to whether a particular dispute is or is not a proper grievance) . . . .

App. 24a.

The parties did not reach a new labor agreement before expiration of the 1999 labor agreement on February 28, 2006, and AK Steel commenced a lockout lasting approximately one year. App. 24a. Negotiations for a new labor agreement continued during that time. App. 24a. During the lockout, in July of 2006, the AEIF affiliated with the International Association of Machinists & Aerospace Workers, AFL-CIO, and was chartered as Local Lodge 1943. App. 25a. The parties ultimately entered into a new labor agreement, which became effective March 15, 2007, and the lockout ended. App. 25a.

The 2007 labor agreement carried over, unaltered in any material respect, the provisions of the 1999 labor agreement vesting an arbitrator with authority to determine issues of both procedural and substantive arbitrability. App. 25a - 26a, 44a - 45a. As observed by the Sixth Circuit, there is no dispute that by this language the parties clearly and unmistakably consented to having an arbitrator determine issues of substantive arbitrability under the 2007 labor agreement. App. 8a, n. 4, 15a.

The 2007 labor agreement also incorporated a Return to Work Agreement (RTWA) intended "to provide for the orderly transfer of work" upon the

return of the locked out bargaining unit members. App. 6a, 46a - 54a. The RTWA established certain conditions of employment that would apply during a fixed six-month transition period from March 15 through September 15, 2007. App. 46a - 54a. The RTWA specified that those conditions would "take precedent over the 2007 Labor Agreement during the Transition Period." App. 50a.

Concerning disputes between the parties, the RTWA provided that "[a]ll matters covered by this Agreement or other matters that occur during the Transition Period shall not be subject to challenge under the grievance and arbitration procedures, or otherwise" except for four enumerated issues: 1) whether an employee failed return to work alcohol and substance abuse testing, or engaged in misconduct during the lockout; 2) whether an employee was disciplined or discharged for just cause following his return to work; 3) whether an employee was paid the correct standard hourly wage, and; 4) whether an employee was properly determined ineligible for health care coverage. App. 51a - 53a. The RTWA, however, did not contain its own grievance and arbitration procedures; rather, the grievance and arbitration procedures referenced in the RTWA is that set forth in the CBA. App. 7a, 14a, 37a.

Since expiration of the six-month transition period on September 15, 2007, AK Steel has refused to proceed to arbitration of 93 separate grievances, and has walked out of the arbitration hearing of a 94th grievance. App. 26a. In each instance, AK Steel asserted that the grievance was not substantively arbitrable because it addressed matters allegedly

arising under the RTWA or otherwise occurring during the transition period. App. 7a.

The 94 grievances fall into four general groups: 45 "red-circle" grievances; 28 "vacation pay" grievances; an "Executive Board" grievance, and; 20 "seniority" grievances. App. 26a.

Forty-five "red circle" grievances filed during the transition period allege that the grievants are entitled to red-circled pay rates but are not receiving such pay. App. 28a. AK Steel denied the grievances upon their merits, but did not challenge their arbitrability. App. 28a. Eight of those grievances were scheduled for arbitration, and the first proceeded to hearing. App. 28a. Following the Union's opening statement, however, AK Steel contended that the Union was raising non-arbitrable issues under the RTWA and refused to proceed with hearing. App. 28a - 29a. Subsequently, AK Steel refused to proceed to arbitration on any of the 45 red-circle grievances absent "a final, non-appealable order of a court of competent jurisdiction." App. 29a.

Twenty-eight "vacation pay" grievances filed after expiration of the transition period allege that AK Steel miscalculated employee vacation entitlements and pay in violation of both the RTWA and the labor agreement. App. 26a. AK Steel answered each of these grievances disputing its substantive arbitrability under the RTWA, and refusing to process the grievance further unless its position should "be determined erroneous by a final, non-appealable order of a court of competent jurisdiction." App. 26a.

An "Executive Board" grievance filed after expiration of the transition period alleges that AK Steel violated the parties' labor agreement by failing to honor the seniority rights of all bargaining unit members following expiration of the transition period. App. 27a. The grievance asserts that AK Steel enjoyed only a temporary right to reassign employees under the RTWA, but upon expiration of the transition period, was obligated to assign employees in accordance with the provisions of the labor agreement. App. 27a. Again, AK Steel answered the grievance disputing its substantive arbitrability under the RTWA and refusing to process the grievance further unless its position should "be determined erroneous by a final, non-appealable order of a court of competent jurisdiction." App. 27a.

Twenty[1] seniority grievances filed after expiration of the transition period allege various seniority violations following expiration of the transition period App. 27a. AK Steel likewise refused to process those grievances contending that they were not substantively arbitrable under the RTWA. App. 27a - 28a.

B. Federal Proceedings.

Local Lodge 1943 brought suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, in the United States District Court for the Southern District of Ohio for an order compelling AK Steel to

[1] After litigation was commenced, Local Lodge 1943 withdrew one of the "seniority" grievances, reducing to 93 the total number of grievances at issue. App. 7a, n. 3.

arbitrate the substantive arbitrability of the 94 (subsequently 93) grievances. App. 8a.

On March 18, 2009, the district court entered its opinion and judgment granting Local Lodge 1943's motion for summary judgment and ordering AK Steel to proceed to arbitration on the issue of the arbitrability of the 93 grievances in dispute. App. 21a - 42a. The district court first observed that the RTWA was part of the 2007 labor agreement, and thus, the two must be read together. App. 36a. The court next noted that although certain issues were subject to grievance and arbitration under the RTWA, and others were not, the RTWA itself set forth no grievance and arbitration procedures. App. 37a. The court concluded that the grievance and arbitration procedures referenced in the RTWA were those set forth in the 2007 labor agreement. App. 37a. The court then reasoned that even though some matters were subject to arbitration under the RTWA, and others were not, the Court should look to the grievance and arbitration procedures set forth in the 2007 labor agreement to determine who should decide substantive arbitrability. App. 37a. Finding that an arbitrator is vested with the authority to determine substantive arbitrability under the 2007 labor agreement, the district court concluded:

> By entering into the RTW Agreement and the 2007 CBA [Collective Bargaining Agreement] and by agreeing to language in the CBA that expressly gives either party the right to refer the question of arbitrability to the arbitrator, the parties "clearly and unmistakably" decided that the arbitrator, and not the court, should determine which disputes are subject to

> arbitration under the grievance procedures set forth in the parties' March 2007 CBA. Accordingly, it is for the arbitrator to decide which, if any, of the 93 grievances are proper grievances that must proceed to arbitration and which of the disputed grievances are not arbitrable.

App. 38a.

AK Steel appealed the decision of the district court to the United States Court of Appeals for the Sixth Circuit. On August 12, 2010, a panel of the Sixth Circuit entered its opinion and judgment reversing the district court and remanding the case for further proceedings. App. 1a - 20a. AK Steel conceded and the Court found that "[i]t is undisputed that the parties clearly and unmistakably consented to having an arbitrator determine the question of substantive arbitrability of claims arising under the 2007 Agreement." App. 8a. Although finding that the RTWA was incorporated within the labor agreement, App. 11a - 12a, and further finding that the RTWA and 2007 labor agreement must be read together, App. 11a, the court nonetheless concluded that standing alone the RTWA did not provide in "clear and unmistakable language" that an arbitrator should decide issues of substantive arbitrability. App. 12a. Rather, the court opined that because the RTWA excluded nearly all claims from arbitration, this evidenced an intent not to be bound by the grievance and arbitration procedures of the 2007 agreement, including its provision that an arbitrator should determine issues of substantive arbitrability, for claims arising under the RTWA or during the transition period. App. 12a - 13a. The

court then reversed and remanded the case to the district court

> . . . to determine first whether the grievances are governed by the Transition Agreement or the 2007 Agreement and then to determine the substantive arbitrability of those grievances governed by the Transition Agreement. The court must first determine if a grievance is governed by the Transition Agreement or by the 2007 Agreement. If a grievance is found to be governed by the 2007 Agreement, that grievance must be sent to an arbitrator. If a grievance is found to be governed by the Transition Agreement, the court will go on to decide the grievance.

App. 13a.

In dissent, and in agreement with the district court, Judge White concluded that because the RTWA references the grievance and arbitration procedures of the labor agreement, a determination as to whether a grievance is arbitrable under the labor agreement or inarbitrable under the RTWA must be made by an arbitrator. App. 14a - 15a. Judge White further noted that the express language of the RTWA supported the district court's conclusion. App. 15a. The RTWA provided that certain matters "shall not be *subject to challenge under* the grievance and arbitration procedure, or otherwise." App. 15a (emphasis by the court). Noting that the RTWA did not simply state that certain matters were not *subject to* the grievance and arbitration procedures, Judge White observed that an arbitrator remained confided with the duty to declare whether a matter was "*subject to challenge*"

under the grievance and arbitration procedures, or in other words, substantively arbitrable. App. 15a (emphasis by the court). Finally, Judge White observed to the extent that a grievance in fact arises under the labor agreement, and not the RTWA, allowing a court to decide its arbitrability would violate the parties' agreement that an arbitrator should decide arbitrability. App. 16a.

REASONS FOR GRANTING THE WRIT

Local Lodge 1943 petitions for a writ of certiorari because the decision of the Sixth Circuit conflicts with relevant decisions of this Court directing that where a labor agreement evinces clear and unmistakable evidence of an intent to arbitrate gateway issues of substantive arbitrability, a court should order arbitration of those issues. Despite its express finding that "[i]t is undisputed that the parties clearly and unmistakably consented to having an arbitrator determine the question of substantive arbitrability of claims arising under the 2007 Agreement," App. 8a, the Sixth Circuit nonetheless directed the district court to determine the substantive arbitrability of 93 grievances AK Steel alleged were precluded from arbitration under express exclusions set forth in a return to work agreement incorporated within the 2007 labor agreement.

Substantive arbitrability, that is, whether a collective bargaining agreement obligates the parties to arbitrate a particular grievance, is an issue for judicial determination "[u]nless the parties clearly and unmistakably provide otherwise. . . ." *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 649, 123 S. Ct. 588, 154 L. Ed. 2d 491 (1986)

(*citations omitted*). Parties to a contract may agree to arbitrate issues of substantive arbitrability, but "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) (*quoting AT&T Technologies*, *supra*, at 649). *See also Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. , 130 S. Ct. 2772, 2777, n.1, 177 L. Ed. 2d 403 (2010); *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. , 130 S. Ct. 2847, 2856, n.5, 177 L. Ed. 2d 567 (2010).

Here, the parties' clear and unmistakable intent to arbitrate issues of substantive arbitrability under the labor agreement is not disputed. Nonetheless, despite its own finding that the RTWA was incorporated within the labor agreement, and moreover, must be read in conjunction with the labor agreement, the Sixth Circuit found that a court must determine whether grievances allegedly arising under the RTWA are substantively arbitrable. It did so based upon a predicate conclusion that because the RTWA excluded most disputes from arbitration, it evidenced an "intent" that the grievance and arbitration procedures of the labor agreement, including the provisions vesting an arbitrator with authority to determine gateway issues of substantive arbitrability, did not apply.[2]

[2] As observed by Judge White in her dissent, however, the very language of the RTWA supports the opposite conclusion. The RTWA does not specify that certain matters are not subject to the grievance and arbitration procedures, but rather, specifies that certain matters are not *subject to challenge under* the grievance and arbitration procedures. Whether a matter is subject to

Respectfully, the Sixth Circuit's analysis is flawed and lacks fidelity to this Court's precedents. While it is true that the RTWA excludes many matters from arbitration, it is equally true that it does not exclude all matters from arbitration. Those matters that do in fact arise under the RTWA, but fall within one of the categories of cognizable disputes, are arbitrable. In addition, those matters that do not arise under the terms of the RTWA, but rather, arise under the terms of the labor agreement, are arbitrable. And these two groups of grievances would be arbitrated in accordance with the grievance and arbitration procedures of the 2007 labor agreement. Given that fact, it begs the question why the parties' agreement to arbitrate arbitrability under those same procedures does not apply in the first instance. The logical answer, and that which defers to the parties' clear and unmistakable agreement to arbitrate arbitrability, is that those provisions do apply, and an arbitrator - not a court - must determine the substantive arbitrability of the disputed 93 grievances.

The Sixth Circuit brushed aside the otherwise undisputed fact that the parties clearly and unmistakably agreed to arbitrate arbitrability simply because some grievances may be found inarbitrable due to the proscriptions of the RTWA. But the issue remains who decides arbitrability, and the parties' labor agreement clearly and unmistakably directs that an arbitrator will make that decision. Having found

challenge under the grievance and arbitration procedures is, of course, an issue of substantive arbitrability, and the grievance and arbitration procedures specify that the determination will be made by an arbitrator.

clear and unmistakable evidence of the parties' intent to arbitrate arbitrability, the Sixth Circuit should have ended its inquiry and ordered arbitration of the arbitrability of the 93 grievances.

This Court has repeatedly stated the rigid but basic rule that where a court finds clear and unmistakable evidence of the parties' intent to arbitrate arbitrability, it must order the parties to so arbitrate. *First Options*, *supra*; *Rent-A-Center*, *supra*; *Granite Rock*, *supra*. The Sixth Circuit, however, has created its own exception to the rule, which is that even if there is clear and unmistakable evidence of intent to arbitrate arbitrability, if the court nonetheless sees what it believes to be clear evidence that a dispute is not substantively arbitrable, it will make the arbitrability decision itself. But in so doing, its exception swallows the basic rule established by this Court. The decision of the Sixth Circuit cannot stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY M. BURKE
Counsel of Record
ROBERT H. MITCHELL
MANLEY BURKE, LPA
225 West Court Street
Cincinnati, Ohio 45202
(513) 721-5525
tburke@manleyburke.com

Counsel for Petitioner

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: Opinion/Judgment, United States Court of Appeals for the Sixth Circuit, (August 12, 2010) 1a

Appendix B: Order/Judgment, United States District Court, Southern District of Ohio, Western Division, (March 18, 2009) 21a

Appendix C: Excerpts from Agreement Between AK Steel Corporation and the International Association of Machinists And Aerospace Workers, AFL-CIO, Local Lodge 1943, Middletown, Ohio (March 15, 2007) 43a

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 09-3425

[Filed August 12, 2010]

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, LOCAL LODGE 1943, *Plaintiff-Appellee,*	)
v.	)
AK STEEL CORPORATION, *Defendant-Appellant.*	)

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 08-00294 Herman J. Weber, District Judge.

Argued: January 12, 2010

Decided and Filed: August 12, 2010

Before: MARTIN and WHITE, Circuit Judges; ZOUHARY, District Judge.*

COUNSEL

ARGUED: George E. Yund, FROST BROWN TODD LLC, Cincinnati, Ohio, for Appellant. Robert H. Mitchell, MANLEY BURKE, LPA, Cincinnati, Ohio, for Appellee. **ON BRIEF:** George E. Yund, Catherine Ann Reed, FROST BROWN TODD LLC, Cincinnati, Ohio, for Appellant. Robert H. Mitchell, Emily T. Supinger, MANLEY BURKE, LPA, Cincinnati, Ohio, for Appellee.

MARTIN, J., delivered the opinion of the court, in which ZOUHARY, D. J., joined. WHITE, J. (pp. 10-13), delivered a separate dissenting opinion.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. The question in this case is who decides who decides. The district court granted appellee International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge 1943's motion for summary judgment, in which the Union sought to compel the arbitration of the question of whether ninety-three

* The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

grievances against appellant AK Steel Corporation were substantively arbitrable under their agreement. The Company argues that the district court erred because the parties did not "clearly and unmistakably" state their intent to submit to an arbitrator the question of the substantive arbitrability of the grievances.

The Company and the Union entered into a Return To Work Agreement ("Transition Agreement") that did not provide for arbitration of grievances except for certain claims arising during the Transition Period, to be followed by a long-term 2007 Collective Bargaining Agreement ("2007 Agreement") with a more expansive grievance and arbitration procedure. The Transition Agreement governs grievances which arise during the Transition Period and are based on violations of the Transition Agreement. The Transition Agreement did not include a "clear and unmistakable" provision that the substantive arbitrability of the Union's grievances would be determined by an arbitrator. Instead, the Transition Agreement explicitly exempted the Transition Agreement from the 2007 Agreement grievance and arbitration procedures, which does clearly state than an arbitrator would determine the question of substantive arbitrability of claims arising under that 2007 Agreement. Thus, the issue of substantive arbitrability of grievances arising under the Transition Agreement, as well as the antecedent question of whether a grievance arises under the Transition Agreement, must be determined by a court.

We therefore **REVERSE** the district court's order and **REMAND** the case to determine whether each grievance is governed by the Transition Agreement or the 2007 Agreement and to determine the substantive

arbitrability of those grievances governed by the Transition Agreement.

I.

The Company operates a steel-making facility in Middletown, Ohio, known as the Middletown Works. The Union represents a bargaining unit consisting of production and maintenance workers at the Middletown Works. This unit was previously represented by the Armco Employees Independent Federation, Inc. The Company and Armco were parties to a collective bargaining agreement, the 1999 Agreement, which was effective from November 1, 1999 until February 28, 2006. The 1999 Agreement provided that, to determine issues of procedural and substantive arbitrability,

> If any question arises as to whether said dispute is or is not a proper grievance within the meaning of these provisions, the question may be reserved throughout the grievance procedure and determined, if necessary by the arbitrator.

Article VII, Section B(1).[1] The Agreement further provided that

> Either party to the Agreement shall have the right to refer to an impartial arbitrator any grievance (including the determination of the question under Section B, Paragraph 1, as to whether a particular dispute is or is not a proper grievance) . . . .

Article VII, Section F(1).[2] The Company and Armco negotiated for a successor agreement, but were unable to do so prior to the expiration of the 1999 Agreement in 2006.

Upon the expiration of the 1999 Agreement, the Company commenced a lockout that lasted approximately one year, during which Armco affiliated with the International Association of Machinists and Aerospace Workers, AFL-CIO, which became the new representative for the bargaining unit. The Company continued negotiations with the Union during the

[1] Substantive arbitrability is whether an issue is within the scope of an agreement's arbitration clause and must be submitted to arbitration. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 552 (1964). Procedural arbitrability is whether the submission of the grievance that is subject to arbitration followed the proper procedures, including timeliness, to qualify for arbitration. *See id.* at 556. While procedural arbitrability is generally determined by the arbitrator unless the parties provide otherwise, substantive arbitrability is generally determined by the court unless the parties provide otherwise. *See id.* at 558.

[2] The parties do not dispute that, under this contract provision in the 1999 Agreement, substantive arbitrability can be reserved by either party and taken to the arbitrator for resolution.

lockout and the parties reached a tentative decision upon a new Agreement on February 28, 2007. The Agreement was ratified and became effective on March 15, 2007. The 2007 Agreement contained language relating to grievance procedures and substantive arbitrability of issues that was virtually identical to that included in Article VII, Sections B(1) and F(1) as reproduced above.

As part of the new 2007 Agreement, however, the parties also negotiated and entered into the Transition Agreement, which was intended to provide for the orderly transfer of work upon the return of employees to work and ramp-up of production after the lockout. The parties tentatively agreed to the Transition Agreement on February 28th and it was ratified on March 15th, along with the 2007 Agreement. The Transition Agreement established a six-month Transition Period, from March 15th through September 15th, during which the Transition Agreement would govern. Under Section K(3) of the Transition Agreement, "the terms and conditions of this Agreement take precedence over the 2007 Labor Agreement during the Transition Period. For example, the forty (40) hour work opportunity of the Employment Security Plan is not applicable during the Transition Period[.]" Section L of the Transition Agreement provided that:

> All matters covered by this Agreement [the Transition Agreement] or other matters that occur during the Transition Period shall not be subject to challenge under the grievance and arbitration procedure, or otherwise, except for the following specifically identified issues . . . .

These narrow types of issues included: (1) whether an employee "discharged from employment for failure of Alcohol and Substance Abuse Testing" or for Work Stoppage Misconduct had tested positive or committed an act of work stoppage; (2) "whether the disciplinary suspension or disciplinary discharge of an employee following return to work was with just cause and due consideration"; (3) "whether the employee was paid the correct standard hourly wage"; and (4) "whether the employee was properly determined ineligible for healthcare coverage". The Transition Agreement did not contain its own grievance and arbitration procedure.

The Union filed ninety-three separate grievances[3] against the Company that the Company argues pertain to events arising during the Transition Period or under the Transition Agreement and are, thus, governed by the Transition Agreement and is arbitration provisions. The Company denied each grievance and refused to submit the disputes to arbitration, arguing that none of the disputes was substantively arbitrable because it either arose under the terms of the Transition Agreement or occurred during the Transition Period. For each grievance, the Company issued a "Step II" grievance answer asserting that the grievance was "not arbitrable" and that it would not process the grievance further unless its position should "be determined erroneous by a final, non-appealable order of a court of competent jurisdiction."

[3] While the Union originally filed ninety-four grievances, the Union withdrew one of the grievances based on individual seniority after this litigation was initiated.

The Union then filed this action in district court pursuant to section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, seeking an order to compel the Company to arbitrate the substantive arbitrability of the ninety-three grievances, as well as an award of attorney fees for the Company's alleged bad faith refusal to submit these grievances to arbitration. The Union argued that the Transition Agreement was a part of the 2007 Agreement, which included a clear and unmistakable provision that an arbitrator, and not a court, will determine both substantive and procedural questions of arbitrability.[4]

The Company responded by arguing that the Transition Agreement explicitly takes precedence over the 2007 Agreement during the Transition Period and "clearly and unmistakably" states that matters covered by the Transition Agreement or other matters occurring during the Transition Period shall not be subject to challenge under the 2007 Agreement grievance and arbitration procedure. The Company argued that, because each of the ninety-three grievances arose during the Transition Period or under the Transition Agreement, the issue of their substantive arbitrability must be determined by a court rather than by an arbitrator because the Transition Agreement is silent on that issue.

The district court granted summary judgment to the Union, ordering the parties to submit the question

[4] It is undisputed that the parties clearly and unmistakably consented to having an arbitrator determine the question of substantive arbitrability of claims arising under the 2007 Agreement.

of the substantive arbitrability of the grievances to an arbitrator. The district court denied the Union's request for attorney fees, finding that the Company had not acted in bad faith. The Company timely appealed.

II.

"We review de novo a district court's decisions regarding . . . the arbitrability of a particular dispute." *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 311 (6th Cir. 2000) (citing *Bobbie Brooks, Inc. v. Int'l Ladies' Garment Workers Union*, 835 F.2d 1164, 1170 (6th Cir. 1987) (stating that district court's finding that a contract exists is subject to de novo review)); *M&C Corp. v. Erwin Behr GmbH & Co.*, 143 F.3d 1033, 1037 (6th Cir. 1998) ("A determination of the arbitrability of a dispute is subject to de novo review.")). We also review de novo a district court's decision to grant a motion for summary judgment. *McMullen v. Meijer, Inc.*, 355 F.3d 485, 489 (6th Cir. 2004) (citing *Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1997)).

III.

"[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes but only those disputes—that the parties have agreed to submit to arbitration." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (citations omitted). "The guiding principles for determining whether a grievance is arbitrable are well established: (1) a party cannot be forced to arbitrate any dispute that it has not obligated itself by contract to submit to arbitration; (2) unless the parties clearly and

unmistakably provide otherwise, whether a collective bargaining agreement creates a duty for the parties to arbitrate a particular grievance is an issue for judicial determination; (3) in making this determination, a court is not to consider the merits of the underlying claim; and (4) where the agreement contains an arbitration clause, the court should apply a presumption of arbitrability, resolve any doubts in favor of arbitration, and should not deny an order to arbitrate 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *United Steelworkers of Amer. v. Mead Corp.*, 21 F.3d 128, 131 (6th Cir. 1994) (citing *AT&T Techs., Inc. v. Communications Workers*, 475 U.S. 643, 648-51 (1986) (quoting *United Steelworkers of Amer. v. Warrior & Gulf Navigation*, 363 U.S. 574, 582-83 (1960))). "Moreover, in cases involving broad arbitration clauses the Court has found the presumption of arbitrability 'particularly applicable,' and only an express provision excluding a particular grievance from arbitration or 'the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.'" *Mead Corp.*, 21 F.3d at 131 (citing *AT&T Techs.*, 475 U.S. at 650 (quoting *Warrior & Gulf Navigation*, 363 U.S. at 584-85)).

Our role is thus limited to determining whether the substantive arbitrability of the ninety-three grievances should be determined by a court or by an arbitrator rather than whether the grievances themselves are arbitrable. *AT&T Techs.*, 475 U.S. at 651. As previously noted, Section L of the Transition Agreement provides that:

> All matters covered by this Agreement [the Transition Agreement] or other matters that occur during the Transition Period shall not be subject to challenge under the grievance and arbitration procedure, or otherwise, except for the following specifically identified issues . . . .

Here, the Company argues that the district court erred in finding that the Transition Agreement included a clear and unmistakable expression of intent to arbitrate the substantive arbitrability of the Union's grievances. The district court's reasoning, agreeing with that of the Union, was as follows: (1) the Transition Agreement was part of the 2007 Agreement; (2) the Transition Agreement did not include its own procedures for grievance and arbitration, and, indeed, referred to them as governing in some of the cases in which arbitration would be permitted; thus, (3) the Transition Agreement incorporated those procedures. It found that the 2007 Agreement vested an arbitrator with the authority to determine issues of substantive arbitrability. Therefore, the district court determined that, because the Union and the Company had agreed to have an arbitrator determine the substantive arbitrability of grievances with regard to issues arising under the 2007 Agreement, they had necessarily agreed to those procedures, despite the mandate that claims arising under the Transition Agreement were not subject to the procedures of the 2007 Agreement. By doing so, the district court erred.

The Transition Agreement and the 2007 Agreement must be read together. The Company conceded as much at oral argument by stating that the Transition Agreement is "incorporated" within the 2007

Agreement. The agreements were ratified together and both took effect on March 15, 2007. The Transition Agreement also cites and incorporates terms of the 2007 Agreement in a number of sections. For example, in Section G, the re-issuance of safety shoes "will be addressed in accordance with Article XXIV of the 2007 Labor Agreement." Additionally, under Section K(3) of the Transition Agreement, "the terms and conditions of this Agreement take precedence over the 2007 Labor Agreement during the Transition Period." Thus, where the terms of the Transition Agreement are more restrictive, those terms trump the 2007 Agreement.

The Transition Agreement does not provide, in "clear and unmistakable" language, for an arbitrator to decide substantive arbitrability. *First Options*, 514 U.S. at 943. Instead, the Transition Agreement specifically states that issues arising under the Transition Agreement or during "the Transition Period shall *not* be subject to challenge under the grievance and arbitration procedure, or otherwise, except for the following specifically identified issues . . . ." Transition Agreement Section L (emphasis added).[5] The

[5] While the Union argues that the Company pre-supposes that the grievances are not substantively arbitrable, this is a misreading of the Company's position. The Company argues that the grievances arise under the Transition Agreement or during the Transition Period and are thus bound by the arbitration rules found in the Transition Agreement rather than by the 2007 Agreement. While the Company believes that the grievances are not substantively arbitrable because it believes that the grievances do not fit within one of the exceptions to the Transition Agreement's provision prohibiting arbitration, this does not mean that the Company's argument is based on the grievances' substantive arbitrability. Rather, the grievances arise under the Transition Agreement and are thus governed by its procedures.

Transition Agreement explicitly excludes nearly all claims from the grievance and arbitration procedures outlined in the 2007 Agreement. This demonstrates the parties' intent not to be bound by these procedures (including the procedure for deciding substantive arbitrability) for claims arising under the Transition Agreement or during the Transition Period.

Thus, the district court erred in finding that the Transition Agreement required that the question of substantive arbitrability be submitted to an arbitrator. Additionally, as the contract is unclear on the matter, it is similarly for a court to determine whether the grievances at issue are subject to the Transition Agreement or the 2007 Agreement.

IV.

For the foregoing reasons, we **REVERSE** the district court's order and **REMAND** the case to determine first whether the grievances are governed by the Transition Agreement or the 2007 Agreement and then to determine the substantive arbitrability of those grievances governed by the Transition Agreement. The court must first determine if a grievance is governed by the Transition Agreement or by the 2007 Agreement. If a grievance is found to be governed by the 2007 Agreement, that grievance must be sent to an arbitrator. If a grievance is found to be governed by the Transition Agreement, the court will go on to decide the grievance.

DISSENT

HELENE N. WHITE, Circuit Judge, dissenting. I respectfully dissent. I view this case somewhat differently than does the majority, and I would affirm the district court.

I do not see this case as presenting the straightforward question "who decides who decides" in the context of an agreement that is silent on the issue. Rather, as noted by the district court, there are two agreements the enforcement of which are implicated by this decision.

I agree with the majority, as well as the district court, that the two agreements must be read together. The district court observed that the Transition Agreement provides that certain matters are subject to challenge under the grievance and arbitration procedure and certain matters are not, but the Transition Agreement sets forth no arbitration and grievance procedure. The court concluded that "the grievance and arbitration procedure to which the RTW [Transition Agreement] refers is that contained in the parties' CBA [the 2007 Agreement]." This is clearly correct.

The court then reasoned that because the grievance and arbitration procedure of the 2007 Agreement is the controlling procedure for grievance and arbitration even under the Transition Agreement because no other procedure was invoked or contemplated by the Transition Agreement, although

the Transition Agreement declared some matters subject to challenge under the grievance and arbitration procedure the court should look to the procedure set forth in the 2007 Agreement to determine who should decide whether the 93 grievances are arbitrable under the 2007 Agreement or not arbitrable under the Transition Agreement. It is undisputed that the 2007 Agreement unambiguously commits such questions to the arbitrator, and thus the district court determined that the arbitrator should decide whether the grievances are arbitrable. I find no error in this analysis.

The language of the Transition Agreement supports the district court's conclusion. The Agreement states that certain matters "shall not be *subject to challenge under* the grievance and arbitration procedure, or otherwise." It does not state that the matters shall not be *subject to* the grievance and arbitration procedure. In stating that the matters are not subject to challenge under the procedure, the Agreement focuses on the substantive arbitrability of the matter, rather than the procedure for determining the substantive arbitrability. Stated differently, a matter that is not subject to challenge under the procedure is a matter that cannot be challenged through the grievance and arbitration procedure, but, as with all matters as to which arbitration is demanded, the arbitrator is confided with the duty to declare that the grievance and arbitration procedure cannot be invoked to challenge the matter. In contrast, a matter that is not subject to the grievance and arbitration procedure is one that is simply not subject to the procedure at all.

Further, as ineluctably true as the majority's assertion that the Transition Agreement explicitly

exempted from challenge under the grievance and arbitration procedure all matters covered by the Transition Agreement or arising during the Transition Period except certain specified issues, is the assertion that grievances not covered by the Transition Agreement and not arising during the six-month period are covered by the 2007 Agreement, which explicitly commits the question of arbitrability to an arbitrator. If the grievances fall into the latter category, allowing a court to decide the question of arbitrability would violate the parties' agreement.

AK Steel asserts that the grievances arise under the Transition Agreement, and the majority opinion in effect assumes that this is an accurate characterization. The Union, however, argues that the grievances arise under the 2007 Agreement. Thus, in the instant case, there is a conflict between the second principle identified by the majority "unless the parties clearly and unmistakably provide otherwise, whether a collective bargaining agreement creates a duty for the parties to arbitrate a particular grievance is an issue for judicial determination" and the fourth principle identified by the majority "where the agreement contains an arbitration clause, the court should apply a presumption of arbitrability, resolve any doubts in favor of arbitration, and should not deny an order to arbitrate 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *United Steelworkers of Amer. v. Mead Corp.*, 21 F.3d 128, 131 (6th Cir. 1994).

Focusing exclusively on the second principle would lead to the conclusion that because the Transition Agreement does not "unmistakably provide" that the

question of arbitrability is for the arbitrator, the question is one for the courts; however, focusing exclusively on the fourth principle would lead to the conclusion that because the 2007 Agreement clearly provides that the arbitrator should decide whether a grievance is arbitrable, the question is one for the arbitrator.

The Union's district court complaint asserts that it presented AK Steel with 93 grievances alleging that AK Steel violated specific terms of the 2007 Agreement, and that each grievance "raised a claim which upon its face and as presented fell within the scope of the grievance and arbitration provisions of the CBA." The 2007 Agreement provides that the arbitrability of such claims will be determined by an arbitrator. If, indeed, the grievances arise under the 2007 Agreement rather than the Transition Agreement, the majority decision will have the effect of giving the Transition Agreement precedence over the 2007 Agreement not just during the Transition Period, but also for the succeeding period, in direct violation of both the Transition Agreement and the 2007 Agreement.

In short, under the majority decision, AK Steel could assert that any grievance concerns a matter that is covered by the Transition Agreement or that occurred during the Transition Period, and thereby deprive the Union of the contractual right to have an arbitrator decide whether the grievance is arbitrable; or, under the district court decision, the Union can assert that a grievance arises under the 2007 Agreement, and force arbitration of the arbitrability question, even though the claim may not be arbitrable. The district court determined that the second

alternative is most consistent with the governing law and the parties' written agreements. I agree and would affirm.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 09-3425

[Filed August 12, 2010]

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, LOCAL LODGE 1943, Plaintiff - Appellee,	)
v.	)
AK STEEL CORPORATION, Defendant - Appellant.	)

Before: MARTIN and WHITE, Circuit Judges; ZOUHARY, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Southern District of Ohio at Cincinnati.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the order of the district court is REVERSED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-08-294

[Filed March 18, 2009]

INTERNATIONAL ASSOC. OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, LOCAL LODGE 1943,	)
Plaintiff,	)
v.	)
AK STEEL CORPORATION,	)
Defendant.	)

ORDER

This matter is before the Court upon plaintiff's motion for summary judgment (doc. 9), defendant's opposing memorandum (doc. 11), and plaintiff's reply (doc. 13). Plaintiff has filed proposed findings of fact and conclusions of law, which defendant has highlighted as true, false or irrelevant (doc. 12).

I. Introduction

Plaintiff International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge 1943 (IAM Local Lodge 1943) brings this action against AK Steel Corporation (AK Steel) under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, to compel the arbitration of 93 separate grievances under the grievance and arbitration provisions of its collective bargaining agreement (CBA) with AK Steel.[1] IAM Local Lodge 1943 moves for summary judgment on the potentially dispositive issue of whether the parties have contractually agreed to submit any and all issues of arbitrability, including substantive arbitrability, to arbitration.

II. Undisputed Facts

The following facts are undisputed.

1. IAM Local Lodge 1943 is a "labor organization" representing "employee[s]" in an "industry affecting commerce" as those terms are defined and utilized within the LMRA, 29 U.S.C. §§ 142, 152 and 185. It represents a bargaining unit consisting of production and maintenance workers at AK Steel's Middletown (Ohio) Works.

[1] The Complaint identifies 94 grievances. IAM Local Lodge 1943, however, subsequently withdrew Grievance No. 07-E-258 from the grievance procedure and no longer seeks an order compelling arbitration of that grievance.

2. AK Steel is an "employer" as that term is defined and utilized within the LMRA, 29 U.S.C. §§ 142, 152 and 185.

3. The Armco Employees Independent Federation, Inc. (AEIF) and AK Steel were parties to a collective bargaining agreement (CBA) with an effective term of November 1, 1999, through February 28, 2006.

4. Article VII of the CBA, "Grievance Procedure," provided for the final and binding arbitration of disputes arising between the parties. Article VII, § (B)(1) provided,

> A grievance, within the meaning of the grievance procedure, is restricted to a request or complaint not resolved as the result of the oral discussions required in Step I or a request or complaint appropriate for filing directly in Step II. It shall consist only of disputes about wages, hours of work, and working conditions, as provided in this Agreement; about the interpretation and application of this Agreement; and about any alleged violation of this Agreement. If any question arises as to whether said dispute is or is not a proper grievance within the meaning of these provisions, the question may be reserved throughout the grievance procedure and determined, if necessary, by the arbitrator.

5. Article VII, § (F)(1) of the CBA provided,

> Either party to this Agreement shall have the right to refer to an impartial arbitrator any grievance (including the determination of the question under Section B, Paragraph 1, as to whether a particular dispute is or is not a proper grievance) which has not been satisfactorily settled in the foregoing steps, provided such reference is made by notification in writing within 30 days following the date of the Step II Decision. The parties shall schedule the grievance within 60 days of the appeal and are required to hear the case within 12 months, unless resolved.

6. On or about November 17, 2000, the parties conducted an arbitration hearing before an arbitrator at which AK Steel's legal counsel, G. Randall Ayers, asserted as to Article VII, §§ B(1) and F(1) that the arbitrator could determine substantive arbitrability if either party took the issue to arbitration. The AEIF attributed the same meaning to these provisions.

7. The November 1, 1999 CBA expired on February 28, 2006, and AK Steel commenced what was to become a lockout lasting approximately one year. Negotiations for a new CBA, which had begun before the lockout, continued during the lockout.

8. Mr. Ayers was chief spokesman for AK Steel throughout the negotiations.

9. During the lockout, and on or about July 31, 2006, the AEIF affiliated with the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM) by means of an election conducted by Region 9 of the National Labor Relations Board. The AEIF was chartered by the IAM as IAM Local Lodge 1943. Members of the AEIF Executive Board, who also constituted AEIF's negotiating committee, remained members of the negotiating committee following the affiliation. At no time did AK Steel declare an impasse or unilaterally implement a new CBA.

10. Tentative agreement upon a new CBA was reached on February 28, 2007. The CBA was ratified by the membership of IAM Local Lodge 1943 and became effective March 15, 2007. AK Steel, the IAM and IAM Local Lodge 1943 were parties to the new CBA. Article XXIX of the CBA provides that it replaces the parties' prior CBA.

11. The March 15, 2007 CBA, like the parties' preceding November 1, 1999 CBA, contains a "Grievance Procedure" at Article VII providing for the final and binding arbitration of disputes arising between the parties. Article VII, §§ B(1) and F(1) are virtually identical to those sections of the preceding CBA.

12. The only change made to these sections was the addition to the last sentence of § F(1) of the words marked in bold print below:

The parties shall **meet and** schedule the grievance within 60 days of the appeal and are required to hear the case within 12 months, unless resolved.

13. Since September 15, 2007, AK Steel has refused to proceed to the arbitration of 93 grievances and has walked out of the arbitration hearing of a 94th grievance. These 94 grievances fall into four general classifications: 28 "vacation pay" grievances; an Executive Board grievance; 20 "seniority" grievances; and 45 "red-circle" grievances. In each instance, AK Steel has refused to proceed to or with arbitration based on its assertion that the underlying grievance is not arbitrable.

14. The 28 vacation pay grievances allege that AK Steel miscalculated employee vacation entitlements. Separate grievances were brought to cover different groups of employees. In response to each grievance, AK Steel issued a "Step II" grievance answer asserting that the grievance was "not arbitrable" and that it would not process the grievance further unless its position should "be determined erroneous by a final, non-appealable order of a court of competent jurisdiction."

15. IAM Local Lodge 1943 Vice-President Neil Douglas sent letters to AK Steel moving each grievance to arbitration and reserving all issues of arbitrability. To date, AK Steel has refused to proceed to arbitration of any of these grievances.

16. On or about September 26, 2007, IAM Local Lodge 1943 filed Executive Board Grievance No. 07-X-210 alleging that AK Steel violated the parties' labor agreement by failing to honor the seniority rights of all bargaining unit members following expiration on September 15, 2007, of the parties' Return to Work Agreement (RTW Agreement). On or about November 1, 2007, AK Steel issued a "Step II" grievance answer asserting that the grievance was "not arbitrable" and that it would not process the grievance further unless its position should "be determined erroneous by a final, non-appealable order of a court of competent jurisdiction." On or about November 2, 2007, Douglas sent a letter to AK Steel moving the grievance to arbitration, asserting its substantive arbitrability, and reserving all issues of procedural arbitrability. By letter dated November 6, 2007, AK Steel Labor Relations Manager Mike Miller informed Douglas that the company's position had not changed. To date, AK Steel has refused to proceed to arbitration of this grievance.

17. The 19 seniority grievances that remain in contention allege various violations of the seniority rights of individuals or groups of individuals. In response to those 19 grievances, AK Steel issued a "Step II" grievance answer asserting that the grievance was "not arbitrable" and that it would not process the grievance further unless its position should "be determined erroneous by a final, non-appealable order of a court of competent jurisdiction." Douglas sent letters in reply to AK Steel moving each grievance to arbitration, asserting its

substantive arbitrability, and reserving all issues of procedural arbitrability. To date, AK Steel has refused to process to arbitration any of these grievances.

18. In response to one of the 20 seniority grievances, 07-A-204 (Leskovac), AK Steel issued a "Step II" grievance answer denying the grievance on the merits. By letter dated October 30, 2007, Douglas moved the grievance to arbitration. Almost four months later, on or about February 27, 2008, Douglas received a letter from Labor Relations Manager Miller contending that the grievance was not arbitrable. To date, AK Steel has refused to proceed to the arbitration of this grievance.

19. The 45 red-circle grievances allege that the respective grievants are entitled to red-circled pay rates but are not receiving such pay. In response to each of those grievances, AK Steel issued a "Step II" grievance answer denying each grievance on the merits. Douglas moved each of the red-circle grievances to arbitration after receiving AK Steel's "Step II" answers. Eight of the grievances were scheduled for arbitration.

20. On April 2, 2008, the parties proceeded to arbitration of Grievance No. 07-D-087 (Lewis) before Arbitrator Eliot Goldstein. At the conclusion of the Union's opening statement, AK Steel asserted that the Union was raising non-arbitrable issues and refused to proceed with the arbitration unless the Union withdrew those contentions. The Union declined to

withdraw its contentions, and AK Steel refused to proceed with the hearing.

21. By letter dated April 4, 2008, AK Steel purported to amend its previous "Step II" answers for each of the red-circle grievances to include the allegation that the grievances were "not arbitrable" and that the company would not proceed to arbitration short of "a final, non-appealable order of a court of competent jurisdiction."

22. By letter dated April 7, 2008, Union President Rich reasserted the arbitrability of the red-circle grievances, noted that the arbitrator was empowered to resolve all issues of procedural and substantive arbitrability raised by the company, and requested the company to reconsider its position. By letter dated April 7, 2008, Miller responded, stating that the company refused to reconsider its position. Rich then sent a second letter dated April 7, 2008, to Miller stating that in light of the company's refusal to reconsider, the Union would reserve all rights to seek appropriate judicial relief. To date, AK Steel has refused to proceed to arbitration of the red-circle grievances.

III. Motion for Summary Judgment

Plaintiff contends that it is entitled to summary judgment because the parties have contractually agreed that an arbitrator, and not a court, will determine questions of arbitrability, whether characterized as procedural or substantive. Plaintiff claims that there is "clear and unmistakable evidence"

that the parties so agreed. Plaintiff asserts that the following express language of Art. VII, §§ (B)(1) and (F)(1) of the CBA reserves the determination of any issue regarding the propriety of a grievance to the arbitrator, when either party so refers such issue:

> If any question arises as to whether said dispute is or is not a proper grievance within the meaning of these provisions, the question may be reserved throughout the grievance procedure and determined, if necessary, by the arbitrator.
>
> . . . .
>
> Either party to this Agreement shall have the right to refer to an impartial arbitrator any grievance (including the determination of the question under Section B, Paragraph 1, as to whether a particular dispute is or is not a proper grievance) which has not been satisfactorily settled in the foregoing steps. . . . .

Plaintiff claims that although the language "the question may be reserved" is permissive, this simply refers to the right of either party to the contract to refer issues of substantive arbitrability to an arbitrator. Plaintiff notes that the CBA also uses mandatory language which vests either party with the unilateral right to refer issues of substantive arbitrability to an arbitrator by providing that "***Either*** party to this Agreement ***shall have the right to refer*** to an impartial arbitrator any grievance . . . ." (emphasis added). Plaintiff further asserts that this is the meaning AK Steel assigns to these provisions as evidenced by the testimony of AK Steel counsel Mr.

Ayers in the 2000 proceeding concerning the virtually identical provisions in the November 1, 1999 CBA. ***See*** Pltf.'s Motion for Summary Judgment, Exh. 2, DeVault Affidavit. Plaintiff claims that the parties have thus agreed, by virtue of the provisions of the CBA, to submit all issues of arbitrability for determination in arbitration when either party so refers such issues, which has occurred here.

In response, defendant contends that the grievances at issue in this case are not governed by the CBA. Defendant argues instead that by its express terms, the RTW Agreement takes precedence over the CBA during a Transition Period ending September 15, 2007, and specifies that matters covered by the RTW Agreement or other matters occurring during the Transition Period shall not be subject to challenge under the CBA grievance and arbitration procedure, subject to certain exceptions that do not apply here. Defendant claims that each type of grievance at issue in the complaint is related to matters that are either covered by the RTW Agreement or that occurred during the Transition Period and are therefore governed by the terms of the RTW Agreement, which does not contain a clear and unmistakable agreement to submit questions of substantive arbitrability to an arbitrator, so that decisions as to substantive arbitrability are appropriately before this Court. AK Steel further argues that even if these matters were covered by the CBA, the language of the 2007 CBA is permissive regarding the parties' agreement to arbitrate all questions of arbitrability in that the CBA states at Art. VII, § (B)(1), "If any question arises as to whether said dispute is or is not a proper grievance within the meaning of these provisions, the question ***may*** be reserved throughout the grievance procedure

and determined, if necessary, by the arbitrator." (emphasis added). AK Steel argues that its counsel in the prior proceeding, Mr. Ayers, likewise assigned a permissive meaning to the language of the CBA.

In reply, plaintiff contends that AK Steel's argument that the grievances are not covered by the CBA goes not to the issue of who determines substantive arbitrability, but rather to the issue of whether the disputed grievances are arbitrable. Plaintiff claims that although the RTW Agreement limited the types of cognizable grievances during the Transition Period, it did not contain a grievance and arbitration procedure separate and apart from that of the CBA, which provides that an arbitrator determines issues of substantive arbitrability. Rather, plaintiff contends that grievances arising during and after the Transition Period are subject to, and processed under, the grievance and arbitration procedures set forth in the CBA. Moreover, plaintiff alleges that AK Steel received and processed each of the disputed 93 grievances under the grievance and arbitration provisions of the CBA, although it challenged the applicability of the provisions at Step II. Plaintiff argues that AK Steel is not free to choose which provisions of Article VII are applicable and which are not. Plaintiff contends that the entire grievance and arbitration procedure of Article VII unquestionably applies to the 93 grievances to which AK Steel issued Step II answers, including those provisions which permit either party to refer all issues of substantive arbitrability to an arbitrator for determination.

IV. Applicable Law

Certain well-established principles govern the resolution of this matter. The first is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." ***United Steelworkers of Amer. v. Warrior & Gulf Nav. Co.***, 363 U.S. 574, 582 (1960); ***A T & T Technologies, Inc. v. Communications Workers of America,*** 475 U.S. 643, 648 (1986).

The second is that "the question of arbitrability - whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance - is undeniably an issue for judicial determination." ***A T & T***, 475 U.S. at 649 (citing ***Warrior & Gulf***, 363 U.S. at 578). "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." ***Id.*** (citing ***Warrior & Gulf***, 363 U.S. at 582-83). In ***First Options of Chicago, Inc. v. Kaplan,*** 514 U.S. 938 (1995), the Supreme Court explained that the question of who has the primary power to decide arbitrability turns upon what the parties agreed about the matter. ***Id.*** at 943. If the parties agreed to submit the arbitrability question itself to arbitration, then the courts should apply the same standard they apply when reviewing any other matter that parties have agreed to arbitrate. ***Id.*** (citing ***A T & T***, 475 U.S. at 649) (parties may agree to arbitrate arbitrability). If, conversely, the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would any other question. ***Id.*** This is so because "arbitration is simply a matter of contract between the parties; it is a

way to resolve those disputes - but only those disputes - that the parties have agreed to submit to arbitration." ***Id.*** The Supreme Court recognized the reverse presumption applicable to an agreement to arbitrate arbitrability, acknowledging that courts should not assume that the parties reached such an agreement unless there is "'clea[r] and unmistakabl[e]' evidence that they did so." ***Id.*** (citing ***A T & T***, 475 U.S. at 649).

The Sixth Circuit has previously considered the arbitrability of grievances under the parties' 1999 CBA. ***See In re Armco Employees Independent Federation, Inc. v. AK Steel Corp.***, 252 F.3d 854, 861 (6th Cir. 2001).[2] In ***Armco***, the Union sought a court order requiring AK Steel to process and arbitrate two grievances under the CBA. AK Steel argued that because one grievance was untimely and the other one was outside the scope of the notice filed for arbitration, the matters were not within the CBA arbitration provision and therefore were not substantively arbitrable. The Sixth Circuit framed the questions before it is as (1) "whether AK Steel is required to process and arbitrate an untimely grievance" and (2) "whether the contracting-out grievance [contesting AK Steel's use of outside contractor employees without giving the union proper notification] is substantively arbitrable." ***Id.*** at 859, 861.

In addressing the first issue, the Court stated that courts determine only substantive arbitrability while arbitrators decide procedural arbitrability. The Court rejected AK Steel's interpretation of the statement in

[2] The language of Art. VII, § B(1) of both CBAs is identical.

A T & T that "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator" as mandating that courts determine both procedural and substantive arbitrability. The Court stated that "the power of federal courts is limited to interpreting the scope of the arbitration clause" and that "***A T & T*** merely clarifies that the responsibility for this decision rests squarely on [the federal court's] shoulders and that [the court] may not delegate it to the arbitrator." ***Id***. at 859.

The Court examined whether the language of the CBA unambiguously provided that an untimely grievance was substantively precluded from going to arbitration to determine if the timeliness grievance fell within an exception to the rule that procedural matters are for the arbitrator to determine, which the Sixth Circuit had crafted in ***General Drivers, Local Union 89 v. Moog Louisville Warehouse***, 852 F.2d 871 (6th Cir. 1988). The Court cited Article VII, § B(1) of the CBA, which it noted "provides that questions of arbitrability are themselves to be submitted to arbitration," as evidence that an untimely grievance was not prevented from going to arbitration. ***Id***. at 861. The Court found that the Supreme Court's directive to arbitrate procedural questions applied and that AK Steel was required to arbitrate the first grievance and submit the timeliness question to the arbitrator. ***Id***.

When discussing whether the contracting out grievance was substantively arbitrable, the Court did not mention Article VII's language about reserving for the arbitrator questions as to whether a dispute is a proper grievance. The Court did not consider whether

the parties had "clearly and unmistakably" agreed to submit the question of arbitrability to the arbitrator. The Court simply reiterated that its role is confined to determining whether the CBA provides for arbitration of the subject matter of the grievance and held that the contracting-out grievance was substantively arbitrable because Article VII, § B(1) provided that "disputes over alleged breaches of the CBA are properly submitted to arbitration." ***Id***. at 862.

V. Analysis

1. Arbitrability of the Grievances

The question before the Court is whether it is the duty of the Court or the arbitrator to determine the arbitrability of the disputes in issue. Supreme Court precedent dictates that this is a matter for the Court to decide, unless the parties clearly and unmistakably provide otherwise. To discern if the parties clearly and unmistakably provided that the arbitrator is to provide substantive arbitrability, the Court must look to the language of the RTW Agreement and the CBA.

The RTW Agreement, which the parties entered into on February 28, 2007, sets forth as its stated purpose

> [t]o provide for the safety and well being of the returning locked out employees represented by the International Association of Machinists, AFL-CIO and IAM Local 1943 (the "Employees" or "Employee"), Temporary Replacement Workers, Contractor Employees and Company Supervisors, to maintain safety, quality, and

> productivity at the Middletown Works, and to provide for the orderly transfer of work . . .

Paragraph K(3) provides that "[t]he terms and conditions of this Agreement take precedence over the 2007 Labor Agreement during the Transition Period." Paragraph L, "Grievance and Arbitration," provides that "All matters covered by this Agreement or other matters that occur during the Transition Period shall not be subject to challenge under the grievance and arbitration procedure, or otherwise, except for the following specifically identified issues . . ." The RTW Agreement then lists certain issues that may be grieved. The RTW Agreement contains no grievance and arbitration procedure. Rather, the grievance and arbitration procedure to which the RTW Agreement refers is that contained in the parties' CBA. The 2007 CBA went into effect when the RTW Agreement expired. It follows that the grievance and arbitration procedure of the parties' CBA applies to the "specifically identified issues" set forth in the RTW Agreement that are subject to challenge under the "grievance and arbitration procedure," even though such issues either were covered by the RTW Agreement or arose during the Transition Period.

Because the parties' CBA governs all matters that are subject to challenge under the grievance and arbitration procedure, including any such matters that are otherwise covered by the RTW Agreement, the Court must look to the CBA to determine whether it is up to the arbitrator or the Court to determine the arbitrability of those grievances. The language of the CBA is clear and unmistakable in this regard. The March 15, 2007 CBA constitutes the "sole recourse with respect to any claim by an employee of a violation

of this Agreement by the Company." The CBA provides that either party "***shall*** have the right to refer to an impartial arbitrator any grievance (including the determination of the question under Section B, Paragraph 1 as to whether a particular dispute is or is not a proper grievance. . .)" (emphasis added). The CBA does not provide an alternative option of referring the determination of the question under Section B, Paragraph 1 to a court of competent jurisdiction. If a party disputes whether or not a particular dispute is a proper grievance, its remedy is to refer that question to an impartial arbitrator. AK Steel's argument to the contrary is not well-taken. By entering into the RTW Agreement and the 2007 CBA and by agreeing to language in the CBA that expressly gives either party the right to refer the question of arbitrability to the arbitrator, the parties "clearly and unmistakably" decided that the arbitrator, and not the court, should determine which disputes are subject to arbitration under the grievance procedures set forth in the parties' March 2007 CBA. Accordingly, it is for the arbitrator to decide which, if any, of the 93 grievances are proper grievances that must proceed to arbitration and which of the disputed grievances are not arbitrable.

Defendant contends that in the event the Court finds the controlling language regarding the parties' agreement to arbitrate questions of substantive arbitrability to be ambiguous, discovery regarding the parties' understanding of the grievance and arbitration provisions of the RTW Agreement is appropriate. Defendant also states that it is prepared to submit a Rule 56(f) affidavit in response to plaintiff's motion for summary judgment on the merits. Because the Court has determined that the parties "clearly and unmistakably" provided that the arbitrator is to decide

questions of substantive arbitrability, discovery on this issue is not warranted.

2. Attorney Fees

Plaintiff contends that it is entitled to attorney fees because AK Steel has acted in bad faith, both in its actions giving rise to the substantive claims and in causing this action to be brought. Plaintiff claims that AK Steel's refusal to arbitrate the grievances, including all issues of arbitrability, constitutes a clear and wanton breach of its contractual commitment to do so. AK Steel disputes that it has acted in bad faith but claims that it justifiably relied on the language of the RTW Agreement to refuse arbitration.

Attorney's fees may be awarded in cases brought under § 301 of the LMRA if a party has acted in bad faith. ***Aircraft Braking Systems Corp. v. Local 856, Intern. Union, United Auto., Aerospace and Agr. Implement Workers, UAW***, 97 F.3d 155, 163 (6th Cir. 1996). The Sixth Circuit has identified three types of bad faith justifying an award of attorney fees under § 301: "1) bad faith occurring during the course of the litigation; 2) bad faith in bringing an action or in causing an action to be brought; and 3) bad faith in the acts giving rise to the substantive claim." ***Id***. (citing ***Shimman v. International Union of Operating Engineers, Local 18***, 744 F.2d 1226, 1230 (6th Cir.1984)).

The Court finds that AK Steel has not acted in bad faith but that instead it had a reasonable basis for contesting arbitrability of the grievances in question. Plaintiff's request for attorney fees is not well-taken.

VI. Conclusion

In accordance with the foregoing, plaintiff's motion for summary judgment is **GRANTED** insofar as plaintiff seeks an order requiring AK Steel to proceed to arbitration on the matter of the question of arbitrability of the 93 grievances in dispute. The Court hereby **ORDERS** the parties to submit to arbitration the question of arbitrability of the 93 grievances in issue. Plaintiff's request for attorney fees is **DENIED**. This case is **CLOSED** and is **TERMINATED** on the docket of the Court at plaintiff's cost.

IT IS SO ORDERED.

S/ Herman J. Weber
HERMAN J. WEBER, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

Case No. C-1-08-294

[Filed March 18, 2009]

INTERNATIONAL ASSOC. OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, LOCAL LODGE 1943,	)
Plaintiff,	)
-vs-	)
AK STEEL CORPORATION,	)
Defendant.	)

JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiff's motion for summary judgment is **GRANTED** insofar as plaintiff seeks an order requiring AK Steel to proceed to arbitration on the matter of the question of arbitrability of the 93 grievances in dispute. The Court hereby **ORDERS** the parties to submit to arbitration the question of arbitrability of the 93 grievances in issue. Plaintiff's request for attorney fees is **DENIED**. This case is **CLOSED** and is **TERMINATED** on the docket of the Court at plaintiff's cost.

JAMES BONINI., CLERK

By:s/ Darlene Maury
Darlene Maury, Deputy Clerk

APPENDIX C

EXCERPTS FROM

AGREEMENT

Between

AK STEEL CORPORATION

and the

INTERNATIONAL ASSOCIATION of
MACHINISTS And AEROSPACE
WORKERS, AFL-CIO

LOCAL LODGE 1943

Middletown, Ohio

March 15, 2007

* * *

[p.13]

ARTICLE VII - GRIEVANCE PROCEDURE

* * *

Section B - Definition of Grievance

1. A grievance, within the meaning of the grievance procedure, is restricted to a request or complaint not resolved as the result of the oral discussions required in Step I or a request or complaint appropriate for filing directly in Step II. It shall consist only of disputes about wages, hours of work, and working conditions, as provided in this Agreement; about the interpretation and application of this Agreement; and about an alleged violation of this Agreement. If any question arises as to whether said dispute is or is not a proper grievance within the meaning of these provisions, the question may be reserved throughout the grievance procedure and determined, if necessary, by the arbitrator.

* * *

[p.17]

* * *

Section F - Arbitration

1. Either party to this Agreement shall have the right to refer to an impartial arbitrator any grievance

(including the determination of the question under Section B, Paragraph 1, as to whether a particular dispute is or is not a proper grievance) which has not been satisfactorily settled in the foregoing steps, provided such reference is made by notification in writing within 30 days following the date of the Step II decision. The parties shall meet and schedule the grievance within 60 days of the appeal and are required to hear the case within 12 months, unless resolved.

* * *

RETURN TO WORK AGREEMENT

This Return to Work Agreement ("Agreement") is made this 28 day of February, 2007 by and among AK Steel Corporation ("AK Steel" or "the Company"), and International Association of Machinists, AFL-CIO, and IAM Local Lodge 1943 (hereafter collectively referred to as the "Union"). To provide for the safety and well being of the returning locked out employees represented by the International Association of Machinists, AFL-CIO and IAM Local 1943 (the "Employees" or "Employee"), Temporary Replacement Workers, Contractor Employees and Company Supervisors, to maintain safety, quality, and productivity at the Middletown Works, and to provide for the orderly transfer of work, the Company and Union agree as follows:

A. Transition Period: The parties agree the period March 15, 2007 through September 15, 2007, shall be deemed the "Transition Period."

B. Cooperation and Good Will: It is imperative that all aspects of returning the Employees to work will be conducted in a positive, constructive, and respectful atmosphere without hostility, violence, threats, or intimidation. The Union and the Company commit themselves to govern their relationship on the basis of mutual respect, and to comply with all Company policies, including the Company policy against Harassment and Workplace Violence.

C. Recall List: The Company will prepare a list of names and badge numbers of active Employees ("Recall List"). The Recall List will exclude Employees that were discharged, retired, or resigned during the

lock out. The Recall List will be submitted to the Union as soon as practicable, but no later than three (3) days after the Ratification Date of the Labor Agreement. The Union will review the list for accuracy based on its records and will promptly report any discrepancy to the Company for immediate resolution. The Company will issue notices to each Employee on the Recall List advising them when and where to report for processing and a return-to-work-physical, including an Alcohol and Substance Abuse Test.

D. Return to Work Physicals; Alcohol and Substance Abuse Testing:

1. Each Employee on the Recall List will be scheduled for a physical exam performed on behalf of the Company to confirm the Employee's fitness for duty. The exams will be conducted at the Company Medical Facility or at some other facility as determined by the Company. The physical exam will be the same exam given to new hires with the exception of Employees who are in the Coke Making Department who will undergo the Coke Oven Emission Control physical exam.

2. Each Employee will be required to pass an Alcohol and Substance Abuse Test that includes hair and urine testing. Employees who do not pass the Alcohol and Substance Abuse Test will not be returned to work and shall be given an option of resigning. If the Employee does not resign, he will be classified as discharged.

3. Employees who do not pass the physical exam for reasons other than a failed Substance Abuse Test will not be returned to work until their

return is approved by the Company Medical Director or until returned in accordance with Paragraph L, Section 1 (b) of this Return to Work Agreement.

E. Employees Eligible for Recall: Employees who report as directed for a return-to-work-physical and alcohol and substance abuse testing, and who pass such exams, will be Employees Eligible For Recall. Employees who do not report as directed will be classified by the Company as resigned and will not be eligible for recall or rehire.

F. Safety Training: Employees Eligible For Recall must complete Safety Awareness and site specific safety training classes as determined by the Company. They will be provided a copy of the AK Steel Safety and Health Rules and Instructions, receipt of which will become part of such Employee's department training record.

G. Personal Protective Equipment ("PPE"): As part of the safety training class, Employees Eligible For Recall will be required to confirm the extent to which they have maintained all required PPE issued to them prior to the work stoppage. To the extent an Employee Eligible For Recall does not have his/her required PPE, arrangements will be made to re-issue missing items, with the exception of safety shoes which will be addressed in accordance with Article XXIV of the 2007 Labor Agreement.

H. Benefits Administration: Employees Eligible For Recall will be required to complete a new set of benefit enrollment forms.

I. Lockers: Employees Eligible For Recall will be assigned lockers by the Company, as they become available.

J. Transition Period; Recall to Active Employment; Work Assignments: During the Transition Period March 15, 2007 through September 15, 2007 the parties recognize and agree to the following:

1. The recall to work of Employees Eligible For Recall will be accomplished in stages over a period of several weeks as determined by the Company. The Company will provide a minimum of five (5) days notice of recall to Employees Eligible for Recall. Notice can be provided by phone or mail. The Union agrees to exercise its best efforts in assisting with the recall process. The goal of the Company is to complete the recall of all Employees Eligible for Recall as expeditiously as practicable, but the Company must complete the recall of all Employees Eligible For Recall no later than ninety (90) days after March 15, 2007

2. Once recalled to work, Recalled Employees will be scheduled to work no less than forty (40) hours per week, excluding the first week of recall to work which will be less than forty (40) hours;

3. Once recalled to work, Recalled Employees may be required to work varying schedules, hours, and crews. Schedules may include 10 or 12 hour shifts;

4. Until manpower requirements can be stabilized and Recalled Employees have satisfactorily completed training or refresher

training, as determined by the Company, Recalled Employees may be assigned or reassigned to work or train in departments throughout the plant;

5. If the Company determines there is an insufficient number of qualified Recalled Employees to satisfy the Company's needs, the Company has the right during the Transition Period, to have bargaining unit work performed by non-bargaining unit employees, notwithstanding any provisions of the 2007 Labor Agreement to the contrary;

6. All employees are subject to random Alcohol and Substance Abuse Testing during the Transition Period.

K. Miscellaneous Matters:

1. Employees will be compensated at Pay Grade 1 with no incentive for time spent in safety related training, processing of documentation in Human Resources and Benefits, return-to-work-physical exams, and/or Alcohol and Substance Testing;

2. The Hourly Wage Incentive Plans will be not be applicable until the first payroll week commencing four (4) weeks after March 15, 2007;

3. The terms and conditions of this Agreement take precedence over the 2007 Labor Agreement during the Transition Period. For example, the forty (40) hour work opportunity of the Employment Security Plan is not applicable during the Transition Period;

4. The parties agree that to assist in return-to-work issues and to facilitate the retraining and restructuring of the workforce, employees will only be entitled to vacation allowance/pay/benefits for Vacation Year 2007 under the following conditions:

a. An employee must be recalled to work and thereafter meet the eligibility requirements of Article XVII, Section C(4);

b. Once an employee meets the eligibility requirements of Article XVII, Section C(4), the below formula will be applied to determine the number of paid vacation days.

$$\frac{\text{Number of Days remaining in calendar year on date employee becomes eligible}}{365} \times \text{Number of days of vacation allowance}$$

c. The employee will receive pay only. No time off will be granted.

d. Vacation pay for the amount determined in b. above will be calculated as follows: 8 multiplied by the Employee's 2006 Vacation Hourly Rate.

L. Grievance and Arbitration: All matters covered by this Agreement or other matters that occur during the Transition Period shall not be subject to challenge under the grievance and arbitration procedure, or

otherwise, except for the following specifically identified issues:

1. Arbitration: Pre-Return to Work:

a. Employees who are discharged from employment for failure of Alcohol and Substance Abuse Testing as set forth in paragraph D or for Work Stoppage Misconduct may grieve the discharge under the grievance and arbitration procedure of the 2007 Labor Agreement; however, the sole question to be presented to the arbitrator is whether the Employee tested positive or committed the act(s) of misconduct as charged. If the arbitrator finds the employee tested positive or committed the act(s) as charged, the discharge shall be upheld. The arbitrator has no authority to modify the penalty of discharge.

b. Employees who are not returned to work by the Company Medical Director following the examination referenced in paragraph D may utilize the Third Party Procedure, set forth in Article X, Section B of the 2007 Labor Agreement. Return to work is defined as a return to any bargaining unit work, regardless of Job Classification or Pay Grade level, with or without restrictions.

2. Arbitration: Post-Return to Work:

a. whether the disciplinary suspension or disciplinary discharge of an employee following return to work was with just cause and due consideration;

b. whether the employee was paid the correct standard hourly wage;

c. whether the employee was properly determined ineligible for healthcare coverage;

M. Coordination of Work with Others: Recalled Employees will be assigned to work with Temporary Replacement Workers, Contractors, and/or Supervisors. To ensure a safe working environment, the parties agree that all individuals will cooperate with one another to ensure a safe, orderly and efficient transfer of duties and work assignments. In the event of any conduct or threatened conduct in the workplace that is determined by the Company to be harassing, threatening or intimidating toward any person or group, the Company will take immediate steps to remedy the situation. Hats, t-shirts, bumper stickers, signs, window signs, or similar displays that refer or relate to Temporary Replacement Workers or to locked out employees are prohibited. Company action may include prompt removal of ary person or group determined by the Company to have caused such activity and/or disciplinary action, up to and including discharge.

N. New Hires: In the event the Company hires as regular full, part time, or temporary Employees some of the individuals who have been working as Temporary Replacement Workers, the Union affirms that it will treat all such individuals with respect and will take no action which discriminates against them in any way. Moreover, the Union will take affirmative steps to be certain that no bargaining unit Employee engages in any detrimental, offensive or harassing conduct toward such persons. In the event of any

conduct or threatened conduct in the workplace that is determined by the Company to be harassing, threatening or intimidating toward any person or group, the Company will take immediate steps to remedy the situation. Company action may include prompt removal of any person or group determined by the Company to have caused such activity and/or disciplinary action, up to and including discharge.

For AK Steel Corporation	For the International Association of Machinists, AFL-CIO and Local Lodge 1943
By:	By:
Its:	Its:
Date:	Date: